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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1937

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UNITED STATES OF AMERICA,
*Petitioner,*
v.
JAMES E. O'DONNELL, ET AL.
No. 487.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

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### OPINIONS BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

### JURISDICTION.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936 (R. 1034). On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937 (R. 1035). On August 19,

1937, an order was granted, extending the time for filing a petition for certiorari to and including October 7, 1937 (R. 1035). The petition for certiorari was filed on October 7, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED.

1. The question upon which the Court below decided the case may be stated as follows: Respondents hold title to certain land under a patent from the United States, issued pursuant to the Swamp Land Act of 1850. The United States asserts an adverse title by purchase in 1853 of a Mexican claim to the land. Confirmation of the claim was secured in a proceeding before the Board of Land Commissioners and the District Court. Because of its previous purchase of the Mexican claim, the United States was the real party in interest in the proceeding against itself to establish the claim. Respondents were not parties thereto. Is the decree in the confirmation proceeding conclusive as to the validity of the Mexican claim and the title of the United States under it in an action by the United States against respondents to cancel respondents' patents and to quiet title in the United States?

2. Was the tract of swamp land, here in controversy, a part of "Mare Island" so as to be within the purported grant by the Mexican Government later purchased by the United States? (The Court below did not reach this question since it held that the United States had not established title as against respondents even if the Mexican grant did include the swamp lands.)

3. Did the United States acquire title to this land by adverse possession? (This is a new question raised by petitioner not considered by the Court below.)

4. A number of other questions were raised in the District Court and on appeal to the Circuit Court of Appeals, but

the Circuit Court of Appeals found it unnecessary to consider them and, for the sake of brevity, they will not be restated here.

## STATEMENT.

This proceeding was brought by the United States in equity to quiet title in itself to certain swamp lands, now reclaimed, which adjoined Mare Island, in San Francisco Bay. The bill of complaint (R. 2-43), as amended (R. 128-129), asks cancellation of a patent to the land issued by the United States to the State of California and of a patent issued by California to one Darlington. These patents are now vested in respondents through mesne conveyances. The answers (R. 45-98), as amended (R. 100-126), denied the validity of the adverse title claimed by the United States and asserted the validity of the patents and conveyances giving title to respondents.

The patents, sought to be cancelled, were issued pursuant to the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519. That Act granted to the states then in existence, of which California was one, all of the swamp lands within their borders which were unsold on the date of the passage of the Act. California thereafter enacted provisions for the survey and sale of the swamp lands (Act of April 28, 1855, Cal. Stat. 1855, p. 189) under which the tract here in controversy was surveyed in 1856 (R. 172) and purchased by Darlington, the patent of California issuing on March 18, 1857 (R. 30-33). Thereafter, as required by a writ of peremptory mandamus issued in the Supreme Court of the District of Columbia (*Work* v. *U. S. ex rel O'Donnell*, 23 F. (2d) 136, Ct. App. D. C.), the patent of the United States to this tract was issued to California (R. 33-35).

The United States claims an adverse title in itself to this tract of swamp land and asserts that the patents now held by respondents are void and of no effect by reason of an alleged Mexican grant (Ex. A to the bill, R. 19) purporting to convey the island "La Yegua" (Mare Island) to one Don

Victor Castro. Through mesne conveyances this alleged grant passed to certain persons named Bissell and Aspinwall, who, pursuant to the Act of Congress of March 3, 1851, 9 Stat. 631, setting up a Board of Land Commissioners for the determination of claimed Mexican titles, filed on August 31, 1852, their petition before the Board, praying confirmation of their title (R. 220-222).

On December 18, 1852, before any steps had been taken in the Board proceeding (R. 218), the United States purchased from Bissell and Aspinwall their claim to the island, receiving a quitclaim deed and bond for title (R. 302-312), Thereafter the Board proceeding was continued, the United States appearing in opposition to the claim and also being the real party in interest in support of the claim. On May 8, 1855, the Board entered its decree confirming the claim (R. 279-280). An appeal was taken to the United States District Court for the Northern District of California (R. 280-284). In the files of that Court in that case is found an unsigned and undated decree affirming the decision of the Board (R. 285-286). This decree carries no endorsement as having been filed. Also there is found with an endorsement "filed April 1, 1857" an order granting an appeal to this court (R. 287). Also there is found reference to a notice by the Attorney General that the appeal would not be prosecuted and to a stipulation to that effect by the District Attorney (R. 286, 288). Also there is found an unsigned and undated order, made on motion of the District Attorney, that the appeal be vacated and that the claimants have leave to proceed under the decree of the court (R. 286-287). The proceeding remained in this state until 1930 when steps were taken which will be hereafter set out.

Meanwhile, on April 9, 1853, after the purchase by the United States of the Castro claim and during the pendency of the Board proceedings, Attorney General Caleb Cushing was asked for his opinion as to the title of the United States to Mare Island. Approval by the Attorney General of the title was required by the Act of March 3, 1853 (10 Stat. 223),

before construction could be commenced on the Naval Yard which was planned for that site. His opinion (8 Op. A. G. 422) stated that he believed California to have a valid claim as against the United States to all of the swamp and overflowed land connected with the Island and suggested that California be invited to relinquish to the United States her claim to the shores and overflowed land of the Island. By Act of May 11, 1854 (Cal. Stat. 1854, p. 48), California granted to the United States the title and interest of the state in the overflowed beach or swamp lands on the eastern shore of the Island from the southern point of the Island to a parallel intersecting the northern point of the highlands of the Island. This did not include the swamp lands here in controversy since they lie entirely to the north of the most northerly point of the highlands.

The United States thereafter proceeded to build a Naval Yard on the Island utilizing also the swamp and overflowed land granted by California. However, the swamp land north of the Island which is here in controversy was not used at that time except for such temporary things as an artillery target and a road along the sand ridge of the beach. Plaintiff's Exhibit GG (original). That Exhibit lists the steam engineering building constructed in 1858 as being partly on the swamp land here in controversy. But this is incorrect as may be seen by an inspection of the drawing which is a part of that Exhibit. The engineering building was partly on the upland and partly on the swamp lands to the east of the Island granted to the United States by the State of California. In 1873 a small house was constructed on the land. This immediately drew protest from respondents' predecessors as is set out below. The land was still in its natural swampy state when examined by Freeman in 1877, the buildings being on the highlands (R. 580). It continued to be overflowed by tides after the date of the construction of the engineering building (R. 600) and at least as late as 1873 and 1874 (R. 624). After the decision in *Sawyer* v. *Osterhaus*, 212 Fed. 765, in 1914, the

Commissioner of the General Land Office advised the United States to take possession without delay (R. 546) and this was done, the United States erecting a fence to the north of the tract (R. 623, 786). Nevertheless, even by 1917 the filling in of the land had not progressed far (R. 806) and the first permanent buildings were not put upon the land until 1918. Plaintiff's Exhibit GG (original).

Meanwhile respondents' predecessors were actively asserting their rights in the property. In 1873 a report of the Board of Civil Engineers to the Secretary of the Navy stated that certain parties claimed ownership of this swamp land by virtue of the swamp land patent from the State of California (R. 488). The Federal authorities had been admonished not to take sand from this land (R. 783). Formal protests were filed with the Surveyor General and with the Commissioner of the General Land Office in 1879 by the Attorney for respondents' predecessors (R. 583-593). By 1905 proceedings were pending in court (R. 535). These proceedings finally terminated in 1914 (*Sawyer* v. *Osterhaus, supra*) with the holding that without legal title the plaintiffs could not maintain the action of ejectment. Thereafter steps were taken in the Land Department to secure a patent, but without success. A mandamus proceeding was then brought against the Secretary of the Interior in the Supreme Court of the District of Columbia in which that Court issued a writ of mandamus requiring the Secretary to determine whether the lands were swampy in character at the date of the Swamp Land Act of 1850. On January 10, 1925, the Secretary decided that they were swamp lands on that date. Respondents then brought another mandamus proceeding against the same officer in the same Court, wherein, after an appeal to the Court of Appeals of the District of Columbia (*Work* v. *United States*, 23 F. (2d) 136) a writ of mandamus issued requiring the Secretary to certify the lands for patent to the State of California. Pursuant to this writ, the patent was issued.

Thereafter the United States Attorney for the Northern District of California appeared in the District Court in the Land Commission confirmation proceeding brought by Bissell and Aspinwall which had been dormant since the unsigned decree and other matters in 1857 heretofore referred to. On motion of the United States Attorney, the District Court on April 15, 1930, entered a decree *nunc pro tunc* affirming the decision of the Board of Land Commissioners (R. 289-291). The District Court was then, for the first time, advised that the United States had purchased the claim sought to be confirmed.

A few months after this *nunc pro tunc* decree, the present proceeding was instituted. After trial on the merits, the District Court entered its decree to the effect that the United States is the absolute owner of the property, that respondents have no right, title or interest in the lands, and ordered the patents and conveyances held by respondents to be delivered up for cancellation, quieting title in the United States (R. 202-206). On appeal, the Circuit Court of Appeals reversed, the majority holding that the decree in the confirmation proceeding was not conclusive, as against respondents, on the question of the validity of the Mexican claim and the validity of the title of the United States thereunder, and that since the United States had not otherwise proved a paramount title in itself, it was not entitled to the relief sought.

## ARGUMENT.

1. It is not disputed by the United States that the Mexican grant under which it asserts title is, in fact, fraudulent. Indeed, in *Bouldin* v. *Phelps*, 30 Fed. 547, officers of the Department of Justice, representing not only the defendant there (the Commandant of the Mare Island Naval Yard) but also the United States (see Opinion, p. 549), asserted and successfully proved the fraudulent character of this same grant. For this reason, probably, the United States does not urge in its petition for certiorari here that it has

proved in this case a valid and paramount title in itself to the land in controversy independently of the asserted binding and conclusive effect of the decree in the Land Commission proceedings purporting to confirm the Mexican grant. The case for the United States thus rests upon the question of whether the Land Commission proceedings are conclusive against respondents on the validity of the grant and the adverse title of the United States thereunder.

The Court below held that respondents were not concluded by the Land Commission proceedings. In so holding, the Court was, we submit, clearly right under principles fully settled by this Court.

The equitable rights to the patent now held by respondents were vested in respondents' predecessor, the State of California, before the commencement of the Land Commission proceedings. The Swamp Land Act of 1850 was a grant *in praesenti* to the states of the unsold swamp lands within their borders. *Wright* v. *Roseberry*, 121 U. S. 488, 509; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559, 570; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 591; *Work* v. *Louisiana*, 269 U. S. 250. The equitable rights which immediately passed under this Act amounted to an inchoate title, even though the particular lands involved had not yet been surveyed and ascertained to be swampy and overflowed. *Rogers Locomotive Works* v. *Emigrant Co., supra*, p. 570; *United States* v. *Minnesota*, 270 U. S. 181. This inchoate title the United States thereafter had no power arbitrarily to destroy (*Michigan Land & Lumber Co.* v. *Rust, supra*, p. 593) and subsequent action by the United States such as the reservation of the land or the issuance of a public land patent to the land would be ineffective. *Work* v. *Louisiana, supra; Tubbs* v. *Wilhoit, supra.*

At the time of the Land Commission proceedings, therefore, California had a definite interest in the land and a definite interest in defeating the Mexican claim. In appearing in opposition to the claim in those proceedings, the

United States was, in reality, representing the interests of California since that State was entitled to the land if the Mexican claimants were not successful. In fact, if respondents were now to be held concluded by the Land Commission decree, they would be concluded because they and their predecessor, the State of California, were represented by the United States in the proceedings. *Beard* v. *Federy*, 3 Wall. 478.

Before any steps had been taken in the Land Commission proceedings, however, the United States acquired the interest of the Mexican claimants. This interest was, of course, adverse to the interests of California. The United States was then in the position of being the real party in interest in support of the Mexican claim and being the representative of California against the claim. In this situation, the case went to decree before the Land Commission and later before the District Court, the United States, in its role of opponent to the claim, dismissing its appeal to this court.

The question here, then, is whether the United States may plead the Land Commission proceedings as conclusive on respondents upon the basis that California, respondents' predecessor, was represented by the United States in the proceedings when, in fact, the United States had an interest in those proceedings adverse to the interest of California. We submit that the answer to this question has already been given by the decisions of this Court. That answer is that respondents are not concluded by the proceedings.

The Court below so held on the ground that the United States had violated a trust relationship between itself and California. In this, the Court was clearly correct. Where inchoate rights to public land have been found to be vested under Acts of Congress, this Court has uniformly decided that the title to the land was held by the United States in trust for the possessor of the rights. See, for example, *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Knapp* v. *Alex-*

*ander Co.*, 237 U. S. 162; *United States* v. *Anderson*, 194 U. S. 394; *Payne* v. *New Mexico*, 255 U. S. 367, 371; *Cornelius* v. *Kessel*, 128 U. S. 456, 460-1; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432. A similar decision has resulted even where the inchoate rights were received through a gift from the United States rather than a sale (*United States* v. *Anderson, supra*) and this rule is applicable to the inchoate rights received by the states under the Swamp Land Act (*Brown* v. *Hitchcock*, 173 U. S. 473, 476; *Michigan Land & Lumber Co.* v. *Rust, supra*).

Under the rule of these cases the United States, at the time of the Land Commission proceedings, held the legal title to the land here in controversy in trust for the State of California. The United States, being such a trustee, could not, in equity, advance its own interests to the prejudice of the rights of the State by purchasing an adverse interest in the property and establishing that interest by litigation against itself as representative of the equitable interests of California. A trustee is not permitted to acquire a dominant interest or otherwise make profit out of dealings with trust property without the express consent of the cestui. *Chicago etc. Railroad* v. *Des Moines etc. Railroad*, 254 U. S. 196, 220. In its petition, the United States seems to contend that before respondents may take advantage of this rule they must plead and prove actual fraud in not properly contesting the claim before the Board of Land Commissioners. But the disability of a trustee to acquire and perfect a personal interest in the subject matter of the trust is not dependent upon proof of actual fraud but is an absolute disability arising out of the high degree of duty and loyalty required of trustees by courts of equity. Bogert, Trusts and Trustees, Vol. 3, secs. 485, 543.

Moreover, even if the United States were not to be held a trustee for California at the time of the Land Commission proceedings, still, we submit, respondents would not be bound by the confirmation decree. By reason of being a privy, California would normally be impliedly represented

by the United States in the proceeding. But when it appears that the United States had an adverse interest in the proceeding it no longer may be assumed that California was properly represented and, certainly as between the United States and California, the decree cannot operate to conclude California's rights.

Situations similar to that presented here involving judicial proceedings where one party was interested in both sides have been considered by this court before and the court has refused to recognize them as conclusive on innocent parties. *Lord* v. *Veazie,* 49 U. S. 251; *United States* v. *Throckmorton,* 98 U. S. 61, 65, 69; *Calhoun* v. *Millard,* 121 N. Y. 69, 76 (followed in *Andes* v. *Ely,* 158 U. S. 312, 317-318); c. f. *Michaels* v. *Post,* 21 Wall. 398. The decisions in those cases were sometimes put on the ground of collusion and sometimes on the lack of an adversary trial. Whatever the ground used, the result is required by the principles of fairness and equity to prevent any possibility of a person's rights being destroyed because the one supposedly representing him had, in fact, an adverse interest in the proceedings.

Petitioners contend that by the Act of May 11, 1854, Cal. Stat. 1854-1855, c. 43, p. 48, California consented to the purchase of the Bissell and Aspinwall claim. That Act was a consent statute under Art. 1, sec. 8, cl. 17 of the Constitution and was also a grant of certain lands to the United States. The Act, however, carefully excluded the land here in controversy and certainly cannot have any force or effect in connection with property to which it did not relate.

Petitioners further assert that the Court below determined the case against them on a new theory not raised in the District Court and not covered by an assignment of error. On the contrary, however, the basis of the decision below was that the United States could not establish its title as against respondents by the decree in the confirmation proceedings because of the fact that it held rights adverse to the interest of California in those proceedings. Respond-

ents repeatedly raised this issue in various ways in the District Court. See motion to exclude the transcript of the confirmation proceedings (R. 131-133); Paragraphs VI, VIII and XIII of the motion to dismiss bill under reserved objections (R. 141-153). See also the following paragraphs of the findings of fact of the District Court which indicate the contentions made by respondents: Paragraph XVI, R. 177-178, Paragraph XXVI, R. 183, Paragraph XXVIII, R. 184-185. Also the same issue was raised by the assignment of errors on appeal to the court below. See Paragraph VI, R. 911; Paragraph XVII, R. 916; Paragraph XXXII, R. 921; Paragraph XXXVI, R. 922-923; Paragraph XXXVII, R. 923; Paragraph XXXVIII, R. 923-924, and Paragraph XXXIX, R. 924. All of the facts establishing this issue, including the fact that the United States had purchased the interest of Bissell and Aspinwall and had carried on the confirmation proceedings thereafter, are clearly shown in the record.

The decision of the court below that respondents are not concluded by the decree in the Land Commission proceedings is, we submit, clearly correct and entirely in accord with fundamental principles of equity and good conscience.

2. Petitioner seeks to invoke the doctrine of laches. However, the record shows, as heretofore summarized in the statement, *supra,* pp. 5-6, that respondents' predecessors immediately protested when the first temporary building was put on the property in 1873 and that they have actively and continuously asserted their rights ever since, while, on the other hand, unequivocable possession was not taken by the United States until 1914 and no permanent improvements were put on the property until 1918. Laches cannot be imputed to respondents on those facts.

3. Petitioner also raises an issue not even considered by the court below, that of adverse possession. It is true that the District Court found that the United States had occupied the tract since 1853. However, this is a proceeding in equity and the court will consider the evidence as in a trial

*de novo.* When the evidence is considered, it is clear that possession of the lands was not taken by the United States until the erection of a fence in 1914. Prior thereto the United States had placed on the land only temporary improvements. Plaintiff's Exhibit GG (original). Certainly temporary acts of the nature of those listed in that Exhibit are insufficient upon which to base title by adverse possession. See the decision of Mr. Justice Field in *San Francisco Savings Union et al.* v. *Irwin,* 28 Fed. 708, affirmed, 136 U. S. 578, involving other swamp lands alleged to belong to Mare Island. But the fatal objection to the contention that the United States received title by adverse possession is to be found in the constant effort of respondents and their predecessors, beginning when the United States first constructed a temporary building on the land and extending over a period of more than fifty years, to enforce their rights to this property (see statement, supra, p. 6). Under the decision in *Sawyer* v. *Osterhaus, supra,* respondents had no available remedy by which to assert their rights until they secured a patent to the land in 1928. In such a case, even a protest to the Government officers would be sufficient to prevent adverse possession by the Government. *Stanley* v. *Schwalby,* 147 U. S. 508. In view of the long course of the controversy here, it cannot be said that a presumption of abandonment by respondents of their rights can have arisen.

4. No important point of law of general application is involved in this case. The suit is a local proceeding to quiet title to a particular tract of land and the decision in it is and must be based on the peculiar facts of this case. In effect, the court below held that petitioner did not sustain the burden of proof requisite in a case of this sort. We are unable to see any basis for the assertion of petitioner (pet. 34) that the decision below creates wholesale uncertainty with respect to California land titles. The decision could have no application to any case where there did not exist the same unusual factual situation that is present here.

One other case involving additional swamp lands adjoining Mare Island is now pending in the District Court for the Northern District of California and presents similar questions. But except for that case, it would seem to us to be extremely unlikely that a case would again arise where the United States asserted title under a fraudulent Mexican grant, confirmed after purchase by the United States, to property which has passed to a state under a prior grant *in praesenti*.

5. Nor has this case otherwise an importance that would warrant a review by this court of the correct decision below. As is stated in the petition (p. 2), the tract here in controversy comprises only an insignificant part of the property connected with the Mare Island Naval Base. The Naval Yard itself is upon Mare Island proper, which consists of highlands, and the title of the United States to those lands is not subject to attack. The petition states, without authority in the record, that the loss of these lands will impair the utility of the entire Base. We cannot believe this to be true since the Base was used for sixty years or more without the use of these lands. If it is true, however, petitioner has, of course, complete protection in its power of eminent domain.

Petitioner asserts, referring to a statement in the dissenting opinion below, that the United States has spent $2,000,000.00 developing these lands as an integral part of the Naval Base. The value of the improvements on the land was put in the findings of the District Court at $1,250,000.00 (R. 172). Nevertheless, whatever has been spent on the land, it clearly appears that permanent expenditures were not made until 1918 and that all expenditures were made with full knowledge of respondent's rights which were at all times being actively asserted. Certainly expenditures so made cannot give to petitioner rights which it otherwise would not possess.

## CONCLUSION.

The decision below was correct. The principles of law involved are not of general importance and have been already settled by this court. The petition should, therefore, be denied.

Respectfully submitted,

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